DA 19-0134

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 43N

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JESSIE AARON SCHULZ,

Defendant and Appellant.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DC-11-492
Honorable Karen S. Townsend, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Rachel G. Inabnit, Attorney at Law, Missoula, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Suzy Boylan, Deputy County Attorney, Missoula, Montana

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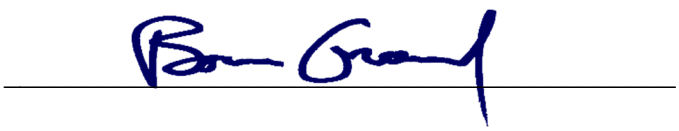

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Jessie Aaron Schulz appeals from the January 3, 2019 grant of the State's Petition to Revoke the deferral of his sentence for violation of terms and conditions of a prior judgment. We affirm.

¶3 On January 4, 2012, Jessie Aaron Schulz (Schulz) entered into a plea agreement for one count of Criminal Possession of Dangerous Drugs, a felony, and one count of Criminal Possession of Drug Paraphernalia, a misdemeanor, in District Court proceeding DC-11-492. At the time, Schulz had another criminal case pending in District Court, cause number DC-11-409, in which he was charged with, and later pled guilty to, Aggravated Burglary, Robbery, and Partner or Family Member Assault. The plea agreement in DC-11-492 stated that "[t]his sentence shall run consecutively to the sentence imposed in DC-11-409."

¶4 On February 29, 2012, the District Court held a sentencing hearing for both DC-11-492 and DC-11-409, imposing deferred sentences for the counts in both proceedings. The sentencing judge did not specify whether the sentences imposed for DC-11-492 and DC-11-409 were to run concurrently or consecutively. However, the

subsequent written Judgment indicated a deferral date of February 28, 2015, for the three-year deferred imposition of sentence for Criminal Possession of Dangerous Drugs under DC-11-492, thereby implying that the DC-11-492 sentence would run from 2012 to 2015, concurrently to the sentence in DC-11-409.

¶5 On February 1, 2018, the State filed a Petition to Revoke Schulz's deferred imposition of sentence due to his recent conviction of a new offense based on a failure to register as a violent offender in early 2014. Schulz filed a motion to dismiss the revocation, arguing in both briefing and at a subsequent hearing that the deferred sentences expired on February 28, 2015, nearly three years before the petition for revocation was brought. The District Court denied this motion, revoked Schulz's deferred sentence, and sentenced him to a five-year Department of Corrections commitment. This appeal followed.

¶6 A district court's denial of a motion to dismiss presents a question of law which this Court reviews de novo. *In re A.D.T.*, 2015 MT 178, ¶ 10, 379 Mont. 452, 351 P.3d 682. We review interpretation and application of the law de novo. *In re A.D.T.*, ¶ 10.

¶7 On appeal, Schulz first argues that the District Court erred in denying his motion to dismiss, contending that his sentences in DC-11-492 and DC-11-409 ran concurrently, both expiring in 2015, such that the State's 2018 Petition to Revoke Schulz's deferral was not timely. *See* § 46-18-203(2), MCA (providing that a petition for revocation of deferral may not be filed after the deferral period has expired). The State contends that Schulz did not properly preserve this argument below. However, our review of the record convinces us that Schulz clearly apprised the District Court of his contention that his probationary period

in both proceedings had expired in February of 2015, such that a subsequent revocation was unlawful. Thus, we review Schulz's claim here.

¶8 The central conflict here is between the written judgment, which appears to imply that the sentences ran concurrently, and both expired in February of 2015, the plea agreement, which provided that the sentences were to run consecutively—therefore extending Schulz's probationary period until 2018—and, finally, the sentencing judge's oral pronouncement, which made no statement on the matter. The oral sentence pronounced from the bench is the legally effective sentence. *State v. Lane*, 1998 MT 76, ¶ 40, 288 Mont. 286, 957 P.2d 9. Under § 46-18-401(1)(a) and (4), MCA, sentences run consecutively unless the court orders otherwise. As a result, the legally effective oral pronouncement rendered the sentences in DC-11-492 and DC-11-409 consecutive, as it did not specify otherwise. The State's failure to move to correct the inconsistent written judgment and Schulz's apparent reliance on this inconsistency does not change the analysis here. Therefore, Schulz's three-year deferred sentence in DC-11-492 did not commence until February 27, 2015, and had not yet expired when the State filed its Petition to Revoke on February 1, 2018. The District Court correctly denied Schulz's motion to dismiss on this matter.

¶9 Schulz also requests that we exercise plain error review over his alternative, unpreserved, argument that if the sentence in DC-11-492 did run consecutively to DC-11-409, it would not have commenced until 2015, such that his alleged 2014 violation should not have led to the revocation of a deferred sentence that had not yet begun. We invoke plain error review of unpreserved issues only sparingly, where we are "firmly

convinced" that a failure to do so may result in manifest miscarriage of justice, unsettled questions of fundamental fairness, or compromised integrity of the judicial process. *State v. Taylor*, 2010 MT 94, ¶¶ 12-13, 17, 356 Mont. 167, 231 P.3d 79 (citation omitted).

¶10 We agree with Schulz that an unlawful revocation of deferral for a failure to abide by the conditions of a sentence that had not yet been imposed might generally raise such concerns. *See Borgen v. Sorrell*, 2009 MT 143, ¶ 10, 350 Mont. 339, 217 P.2d 1022 (holding that "[i]ncarceration of an individual pursuant to a sentence which imposes a facially illegal sentence enhancement represents a grievous wrong and a miscarriage of justice"). Here, however, the revocation was not facially illegal. Section 46-18-203(2), MCA, specifically provides for the filing of a petition for revocation of deferral or suspension before or during the deferral or suspension period. The State filed its petition during the deferral period, rendering the petition timely under the plain language of § 46-18-203(2), MCA.

¶11 Notwithstanding that the State *filed* its petition during the deferral period in DC-11-492, Schulze points out that the underlying *conduct* occurred prior to the commencement of that period. However, Schulz points to no statutory language imposing any requirements upon when the underlying conduct must occur. Moreover, if § 46-18-203(2), MCA, allows *filing* for revocation prior to the commencement of the deferral period, then it clearly must also envision revocation based on *conduct* that occurred prior to the deferral period. *See State v. Graves*, 2015 MT 262, ¶ 15, 381 Mont. 37, 355 P.3d 769 ("The statute thus allows for a suspended sentence to be revoked for violations of the conditions of suspension before the period of suspension has begun."); s*ee also State*

v. Cook, 2012 MT 34, ¶ 15, 364 Mont. 161, 272 P.3d 50 (describing how a 2011 amendment to § 46-18-203(2), MCA, abrogated the Court's prior holding in *State v. Stiffarm*, 2011 MT 9, ¶ 19, 359 Mont. 116, 250 P.3d 300, that a petition for revocation could not be filed prior to the commencement of the period of deferral). Thus, the sentencing court did not commit plain error by granting the State's Petition to Revoke the deferral of Schulz's sentence commencing in February of 2015 based on conduct occurring in 2014.

¶12 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law.

¶13 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA
/S/ BETH BAKER
/S/ INGRID GUSTAFSON
/S/ DIRK M. SANDEFUR
/S/ JIM RICE